

## RESOLUTION

AUTHORIZING THE EXECUTION OF AN INTERGOVERNMENTAL AGREEMENT WITH THE STATE OF HAWAII RELATING TO THE MAINTENANCE OF DISPERSION CHANNEL STRUCTURES TO BE CONSTRUCTED ON ROUND TOP DRIVE, OAHU.

WHEREAS, Chapter 1, Article 8, Revised Ordinance of Honolulu 1990, as amended, requires that any intergovernmental agreement or any amendments thereto which places an obligation upon the City and County of Honolulu or any department or agency thereof shall require prior City Council's consent and approval; and

WHEREAS, the State of Hawaii, by its Board of Land and Natural Resources (the "State") and the City Department of Facility Maintenance ("DFM"), have identified an opportunity to improve drainage originating from two drainage culverts on Round Top Drive; and

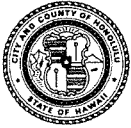
WHEREAS, the State is the fee owner of the Round Top Drive land identified in Tax Map Key No. (1) 2-9-018:001, and more particularly delineated on Exhibit "A" attached hereto and made a part hereof (the "State Premises"); and

WHEREAS, the State has agreed to construct a dispersion channel, designed to spread out runoff water over a large area to minimize the impact of flow from the drainage outlets ("Dispersion Channels") on the State premises if DFM will maintain the structures; and

WHEREAS, DFM is agreeable to maintaining the Dispersion Channels provided that the State retains ownership of the structures; and

WHEREAS, the State and DFM desire to enter into a Use and Access Agreement for DFM's maintenance of dispersion channel structures on the State Premises to be constructed and owned by the State along Round Top Drive; now, therefore

BE IT RESOLVED by the Council of the City and County of Honolulu that the Mayor or the Director of DFM, or the Director's designee, is hereby authorized to execute a Use and Access Agreement with the State in substantially the same form as the proposed Agreement attached hereto as Exhibit "B", as well as any amendments or incidental or related agreements pertaining thereto; and



**CITY COUNCIL**  
CITY AND COUNTY OF HONOLULU  
HONOLULU, HAWAII

No. 10-61

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## RESOLUTION

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BE IT FURTHER RESOLVED that the Clerk be and is hereby directed to transmit a copy of this Resolution to the Mayor, City and County of Honolulu, and the Director of Facility Maintenance, Kapolei Hale, 1000 Ulu`Ohi`a Street, Suite 215, Kapolei, Hawaii.

INTRODUCED BY:

(br)

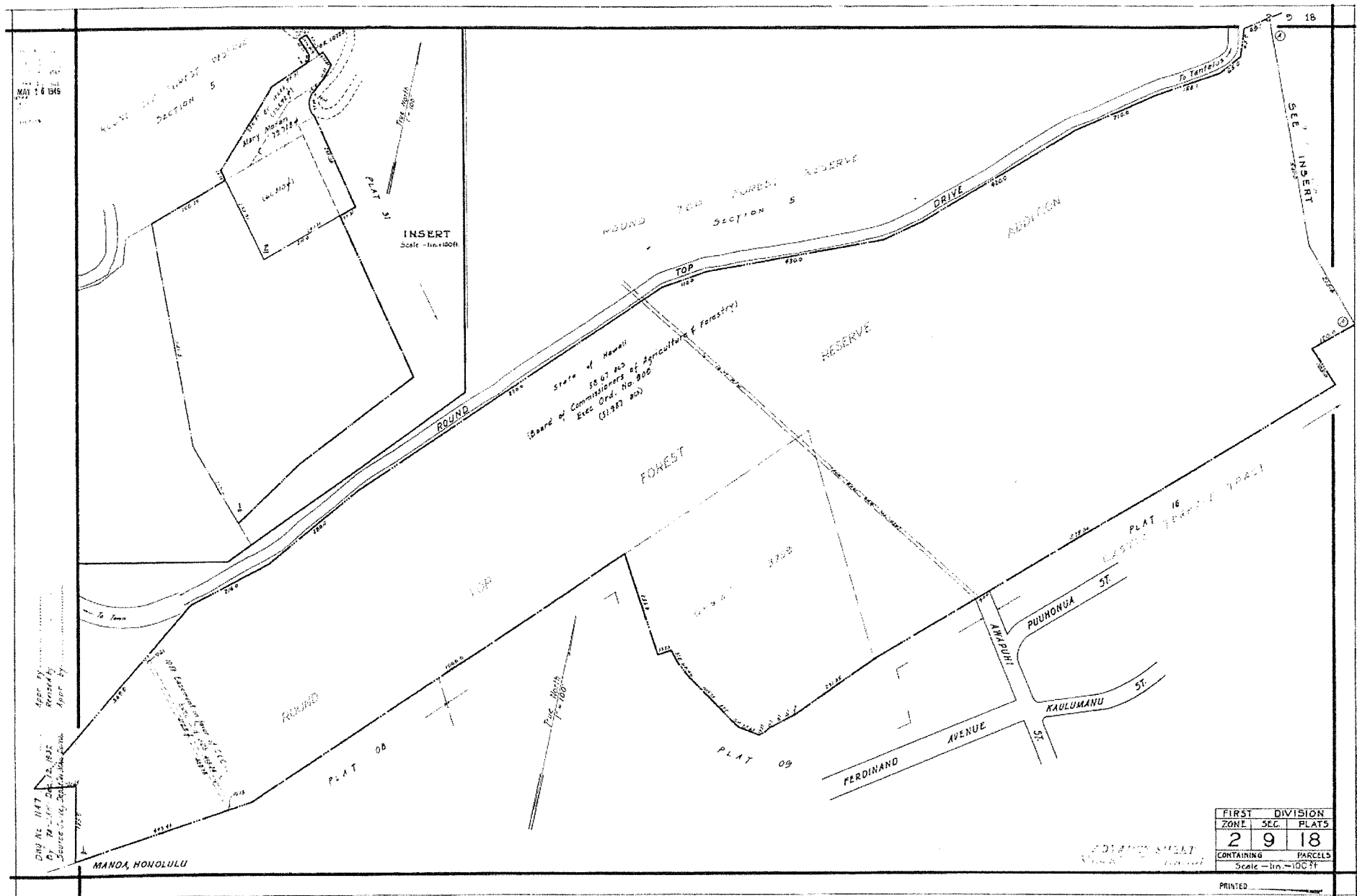
DATE OF INTRODUCTION:

MAR - 3 2010

Honolulu, Hawaii

Councilmembers

# EXHIBIT "A"



LAND COURT SYSTEM		REGULAR SYSTEM	
Return by Mail ( )	Pickup ( )	To:	

Total Number of Pages: \_\_\_\_\_  
 LOD No. \_\_\_\_\_ Tax Map Key No. \_\_\_\_\_

THIS AGREEMENT is effective as of \_\_\_\_\_,  
by and between the STATE OF HAWAII, by its Board of Land and  
Natural Resources, (hereinafter referred to as the "Grantor") and  
CITY AND COUNTY OF HONOLULU, DEPARTMENT OF FACILITY MAINTENANCE,  
whose principal place of business and post office address is 1000  
Ulu Ohia Street, Kapolei, Hawaii 96707 (hereinafter referred to  
as the "City").

RECITALS:

WHEREAS, the Grantor is the owner of the land identified in Tax Map Key No. \_\_\_\_\_, and is more particularly delineated on Exhibit "A" attached hereto and made a part hereof (hereinafter referred to as the "Property"); and

WHEREAS, the City desires to enter and use a portion of the Property, as described and delineated on Exhibit "B" (consisting of a site plan) attached hereto and incorporated herein by reference (hereinafter referred to as the "Premises"), for purposes of maintaining two State-owned concrete dispersion channels designed to spread out the point discharge from two drainage outlets, (hereinafter collectively referred to as the "Dispersion Channel Areas"); and

WHEREAS, the Grantor does not object to granting the City use and access rights over the Premises provided the City fully complies with the terms and conditions set forth below.

NOW, THEREFORE, in consideration of the mutual covenants and promises herein made, the parties do hereby agree as follows:

AGREEMENT:

1. **Grant of Use and Access Rights.** The Grantor hereby grants the City the perpetual non-exclusive right to use and access the Premises for the purpose of inspection and maintenance of the Dispersion Channel Areas.

2. **Maintenance.** The City shall, at its sole cost and expense and on a routine schedule, inspect the Dispersion Channel

Areas, and at its sole convenience and determination, maintain the Dispersion Channel and assist in keeping the Premises in a safe, clean, sanitary, and orderly condition. The City shall not make or knowingly permit or suffer any waste, strip, spoil, nuisance or unlawful, improper, or offensive use of the Premises.

3. **Repair.** The City shall not damage, undermine or otherwise destroy any portion of the Property and the Premises, including, without limitation, the Dispersion Channel Areas or any of Grantor's improvements situated on or near the Premises or any equipment or appurtenances relating thereto. The City shall, at its sole cost and expense, repair, restore and reconstruct that portion of said Property and Premises so damaged, undermined or destroyed, including any and all affected improvements, equipment and appurtenances, by the City's use of the Premises.

4. **Reservation of Rights.** The Grantor reserves unto itself the right of full use and enjoyment of the Premises and to grant to others rights and privileges for any and all purposes affecting the Premises, all without charge by and without the consent of the City, provided that such use by the Grantor and/or third parties does not unreasonably interfere with the City's rights to access and use the Premises under this Agreement. The City shall take steps necessary to ensure that the City's exercise of the rights and privileges granted hereunder does not

cause any substantial interference with the Grantor's operations in or near the Premises and Property.

5. **City's Responsibility.** The City shall at all times with respect to accessing and using the Premises area use due care for public safety and agrees to indemnify, defend, and hold the Grantor harmless from and against any claim or demand for loss, liability, or damage, including claims for bodily injury, wrongful death, or property damage, arising out of or resulting from: 1) any act or negligent omission on the part of the City relating to the City's use, maintenance, or enjoyment of the Premises area; and 2) any failure on the part of the City to maintain the Premises and roadways and curbing areas adjacent thereto in the City's use and control, and including any accident, fire or nuisance, growing out of or caused by any failure on the part of the City to maintain the Premises in a safe condition; and 3) from and against all actions, suits, damages, and claims by whomsoever brought or made by reason of the City's non-observance or non-performance of any of the terms, covenants, and conditions of this Agreement or the rules, regulations, ordinances, and laws of the federal, state, municipal or county governments.

6. **Work within or Affecting the Premises.** If the Grantor decides to perform work of any kind within, on, over, under, across, near, or affecting the Premises, the Grantor will

coordinate such work with the City. The City shall not unreasonably prevent the Grantor from performing such work, provided, however, that the Grantor will take certain protective measures to assure that such work does not unreasonably interfere with the City's use of the Premises.

7. **Assignment.** The City's rights under this Agreement shall not be sold, assigned, conveyed, leased, mortgaged, or otherwise transferred or disposed of, directly or by operation of law, except with the prior written consent of the Grantor.

8. **Default.**

a. **Notice of default.** If the City defaults on or otherwise fails to perform its obligations under this Agreement, the Grantor will issue a written notice of default to the City by hand-delivery or first-class mail.

b. **City to cure defaults.** Any and all defaults or failures to perform contained in such notice of default must be resolved and remedied to the Grantor's reasonable satisfaction within forty-five (45) days of the City's receipt of the Grantor's written notice to the City or such further time as may be authorized by the Grantor in writing; provided, however, that if the nature of such default is such that the cure cannot reasonably be completed within forty-five (45) days or such further time, the City may have such additional time as may be reasonably necessary to cure such default, so long as the City



shall have commenced such cure within such forty-five (45) days or additional time period and shall diligently complete such cure. The City's failure to inspect and maintain the Dispersion Channel Areas in accordance with this Agreement shall be deemed a default of this Agreement.

c. **Remedies for failure to cure.** If the City fails to cure said defaults or failures to perform within the required time, the Grantor itself may, but shall not be obligated to, cure or remedy said defaults or failures to perform and charge any reasonable costs and expenses incurred in performing said cure or remedy to the City, who shall pay said costs and expenses to the Grantor within 60 days after receiving notice from the Grantor. If the City fails to cure said defaults or failures to perform within the required time period, the Grantor may terminate this Agreement and the City's rights under this Agreement to use the Premises. If the City defaults or fails to perform as required under this Agreement, the Grantor shall be entitled to all remedies available under this Agreement and by law, which remedies shall be cumulative and not exclusive.

9. **Termination.** This Agreement may be cancelled in whole or in part at any time by mutual written agreement of the parties hereto.

10. **Hazardous Materials.**

a. Grantor's pre-approval required. The City shall not cause or permit the presence, escape, disposal, discharge or release of any hazardous materials except as permitted by law. The City shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto and/or into the Premises any such materials except to use in the ordinary course of the City's business, and then only after written notice is given to the Grantor of the identity of such materials and upon the Grantor's consent, which consent shall not unreasonably be withheld. As used in this paragraph 10, the "presence, escape, disposal, discharge or release of hazardous materials" includes, but is not limited to oil, fuel, PCB spillage or leakage, improper waste oil disposal and pollution of any water attributed to the City's (a) operations and activities on or connected with the Premises or (b) use and access of the Premises.

b. The City's responsibility. If any lender or governmental agency shall ever require testing to ascertain whether or not the City has caused or permitted the escape, disposal, discharge or release of hazardous materials, the City shall be responsible for the reasonable costs thereof.

c. "Hazardous materials" definition. For the purpose of this Agreement, "hazardous materials" shall mean any

pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and the Federal Clean Water Act, all as amended, or any other federal, state or local environmental law, regulation, ordinance, rule, or by-law, whether existing as of the date hereof, previously enforced, or subsequently enacted.

d. **City's clean-up obligation.** Except and to the extent caused by the willful misconduct or negligence of the Grantor or existing on the Premises prior to the effective date of this Agreement, upon termination of this Agreement, the City shall, at its sole cost and expense, if required by law, clean up and decontaminate the Premises and remove all hazardous materials therefrom, including, without limitation, clean-up of surface and ground waters and making the soil free and clear of all such contaminants and hazardous material.

11. **Compliance With Laws.** The City, at all times during the term of this Agreement, shall comply with all of the requirements of the federal, state, and county laws, statutes, ordinances, rules and regulations, now in force or which may hereafter be in force.

12. **Binding Effect.** All provisions contained in this Agreement shall be binding upon and inure to the benefit of the

respective parties, their successors and permitted assigns, and officers, agents, and employees.

13. **Singular, Plural.** All words used herein in the singular number shall extend to and include the plural. All words used in any gender shall extend to and include all gender.

14. **Headings.** The headings and captions herein are for convenience of reference only and are not intended to fully describe, define or limit the provisions of this Agreement of which they may pertain.

15. **Attorney's Fees and Expenses.** In case the Grantor shall, without any fault on its part, be made a party to any litigation commenced by or against the City as a result of this Agreement (other than condemnation proceedings), the City shall pay all costs, including reasonable attorney's fees and expenses incurred by or imposed on the Grantor; furthermore, the City shall pay all costs, including reasonable attorney's fees and expenses, which may be incurred by or paid by the Grantor in enforcing the covenants and conditions of this Agreement, or in the collection of delinquent rental, fees, taxes, and any and all other applicable charges attributed to said Dispersion Channel Areas.

16. **Non-discrimination.** The City covenants, for itself, its successors and assigns, that the use and enjoyment of the land herein granted shall not be in support of any policy which

discriminates against anyone based upon race, creed, sex, color, national origin, religion, marital status, familial status, ancestry, physical handicap, disability, age or HIV (human immunodeficiency virus) infection.

17. **Time Is Of The Essence.** Time is of the essence in this Agreement and if the City shall abandon the Premises, or if this Agreement and Premises shall be attached or taken by operation of law, or if any assignment is made of the City's property for the benefit of creditors, or if City shall fail to observe and perform any of the covenants, terms, and conditions contained in this Agreement and on its part to be observed and performed, and this failure shall continue for a period of more than sixty (60) calendar days after delivery by the Grantor of a written notice of breach or default, by personal service, registered mail or certified mail to the City at its last known address and to each mortgagee or holder of record having a security interest in the Premises, the Grantor may, subject to the provisions of section 171-21, Hawaii Revised Statutes, at once re-enter the Premises, or any part, and upon or without the entry, at its option, terminate this Agreement without prejudice to any other remedy or right of action for any preceding or other breach of contract; and in the event of termination, at the option of Grantor, all improvements shall remain and become the property of the Grantor or shall be removed by City.

18. **Withdrawal.** The Grantor reserves the right to withdraw the Dispersion Channel Areas for public use or purposes, at any time during this Agreement upon the giving of reasonable notice by the Grantor and without compensation.

19. **No Mortgage.** The City shall not mortgage or pledge the Premises, any portion, or any interest in this Dispersion Channel Area without the prior written approval of the Chairperson of the Board of Land and Natural Resources and any mortgage or pledge without such approval shall be null and void.

20. **No Parking.** The Dispersion Channel Areas shall not be used at any time by the City, its guests or invitees for parking purposes.

21. **Trimming.** The City shall at all times during the term of this Agreement, trim all vegetation growing within, over, or onto the Dispersion Channel Areas so that it does not present a threat to public safety by creating or contributing to roadway, waterway, or pedestrian obstruction, visual obstruction to operators of vehicles, fire hazards, or interference with or downing of power lines.

22. **Environmental Impact Regulations.** The City shall comply with all applicable federal and state environmental impact regulations.

23. **Pollution And Contamination Control Measures.** The City shall maintain and employ debris, pollution and contamination

control measures, safeguards and techniques to prevent debris, pollution or contamination to the ocean waters, streams or waterways resulting from the City's, its invitee's, or its agent's use, maintenance, repair and operation of the Dispersion Channel Areas, and shall take immediate corrective action in the event of such pollution or contamination to immediately remove the cause of such pollution or contamination, and shall immediately clean the Premises area and its surrounding waters of such pollutant or contaminant and restore to the Grantor's satisfaction the areas affected by such pollution or contamination, all at the City's own cost and expense.

24. **No Rent.** The Grantor shall not charge the City any rent or other fee in connection with the City's access and use of the Premises under this Agreement.

25. **Amendment.** This Agreement may not be amended except in writing and signed by both parties.

26. **Governing Law.** The laws of the State of Hawaii shall govern this Agreement and the relationship between the parties.

27. **Approvals.** The Premises area is encumbered by the Honolulu Watershed Forest Reserve Governor's Executive Order No. \_\_\_\_\_ to the State of Hawaii, Department of \_\_\_\_\_, and therefore Agreement is subject to the Department of \_\_\_\_\_'s approval. Said approval was obtained on \_\_\_\_\_.

The Premises area is encumbered by the General Lease No. S-4304 issued to \_\_\_\_\_, as Lessee, and therefore this Agreement is subject to the Lessee's approval. Said approval was obtained on \_\_\_\_\_.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

**STATE OF HAWAII**

APPROVED AS TO FORM:

\_\_\_\_\_  
Deputy Attorney General

Dated: \_\_\_\_\_

Approved by the Board of  
Land and Natural Resources  
at its meetings held on  
\_\_\_\_\_.

By \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: Chairperson, Board of  
Land and Natural Resources

**APPROVED AS TO FORM  
AND LEGALITY:**

\_\_\_\_\_  
Deputy Corporation Counsel

Engineer

Dated: \_\_\_\_\_

**CITY AND COUNTY OF HONOLULU  
DEPARTMENT OF FACILITY  
MAINTENANCE**

By \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: Director and Chief



STATE OF HAWAII )  
 ) SS.  
CITY AND COUNTY OF HONOLULU )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_,  
before me appeared \_\_\_\_\_,  
to me personally known, who, being by me duly sworn, did say that  
\_\_\_\_\_ is the Director and Chief  
Engineer of the CITY AND COUNTY OF HONOLULU, a municipal  
corporation, Department of Facility Maintenance, and that the  
seal affixed to the foregoing instrument is the corporate seal of  
said municipal corporation, and that the foregoing instrument was  
signed and sealed in behalf of said municipal corporation by  
authority of the City Council of said City and County of  
Honolulu, and said \_\_\_\_\_  
\_\_\_\_\_ acknowledged said instrument to be the free  
act and deed of said municipal corporation.

Notary Public, State of Hawaii

My commission expires:

<b>Doc. Date:</b> _____		<b>#Pages:</b> _____	
<b>Notary Name:</b> _____		_____ <b>Circuit</b>	
<b>Doc. Description:</b> _____			
_____			
_____		_____	
<b>Notary Signature</b>		<b>Date</b>	

CITY COUNCIL  
CITY AND COUNTY OF HONOLULU  
HONOLULU, HAWAII  
C E R T I F I C A T E

RESOLUTION 10-61

Introduced: 3/3/10 By: TODD APO (BR)

Committee: COUNCIL

Title: RESOLUTION AUTHORIZING THE EXECUTION OF AN INTERGOVERNMENTAL AGREEMENT WITH THE STATE OF HAWAII RELATING TO THE MAINTENANCE OF DISPERSION CHANNEL STRUCTURES TO BE CONSTRUCTED ON ROUND TOP DRIVE, OAHU.

Links: [RES10-61](#)

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CC-40 KOBAYASHI – RE-REFERRAL OF RESOLUTION 10-61 FROM PUBLIC INFRASTRUCTURE TO COUNCIL FLOOR.

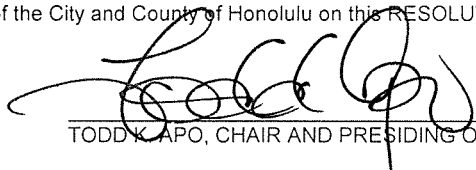
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COUNCIL	3/17/10	RESOLUTION 10-61 ADDED TO THE AGENDA.							
ANDERSON	Y	APO	Y	CACHOLA	Y	DELA CRUZ	Y	DJOU	Y
GARCIA	Y	KOBAYASHI	Y	OKINO	Y	TAM	Y		
RESOLUTION 10-61 ADOPTED.									
ANDERSON	Y	APO	Y	CACHOLA	Y	DELA CRUZ	Y	DJOU	Y
GARCIA	Y	KOBAYASHI	Y	OKINO	Y	TAM	Y		

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I hereby certify that the above is a true record of action by the Council of the City and County of Honolulu on this RESOLUTION.

  
BERNICE K. N. MAU, CITY CLERK

  
TODD K. APO, CHAIR AND PRESIDING OFFICER